BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

DURL WORKMAN	
Claimant VS.))) Docket No. 184,290
CITY OF CLYDE) Docket No. 164,290
Respondent AND	
EMPLOYERS MUTUAL CASUALTY Insurance Carrier	

ORDER

ON the 5th day of May, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of a preliminary hearing order entered by Administrative Law Judge George R. Robertson, dated March 22, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, James Zongker of Wichita, Kansas. Respondent and insurance carrier appeared by and through their attorney, Ronald J. Laskowski of Topeka, Kansas. There were no other appearances.

RECORD

The record consists of the documents filed of record with the Division of Workers Compensation in this docketed matter, and includes the transcript of preliminary hearing of February 9, 1994; the deposition of David Dean Hughes taken on January 31, 1994; the deposition of Alice Hughes taken on January 31, 1994; and the deposition of Durl Workman taken on March 14, 1994; along with the exhibits attached to these transcripts.

ISSUES

For preliminary hearing purposes, the administrative law judge found that claimant was entitled to benefits under the Workers Compensation Act for a work related accident of October 25, 1993. Also, the administrative law judge found that the City of Clyde and its insurance carrier were liable for these benefits as the city was the statutory employer of the claimant under the provisions of K.S.A. 44-503. The respondent now requests the Appeals Board to review that order.

The issues before the Appeals Board are:

- (1) Whether the City of Clyde is responsible for claimant's workers compensation benefits as a statutory employer under the provisions of K.S.A. 44-503?
- (2) Whether past due benefits ordered paid by the administrative law judge are stayed pending appeal?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board, for purposes of preliminary hearing, finds:

- (1) The City of Clyde is the statutory employer of the claimant for purposes of this workers compensation proceeding and the work related accident of October 25, 1993. The preliminary hearing order of Administrative Law Judge George R. Robertson dated March 22, 1994, should be affirmed.
- (2) On October 25, 1993, claimant was employed by United Industrial and was helping to cut down and remove a large elm tree from the property of the City of Clyde. The claimant fell from the tree and injured his neck. Claimant is now quadriplegic.

The City of Clyde, Kansas, is a third class city of approximately 780 people. The city has three full time employees; the police chief, the director of operations and the deputy director of operations. These employees are responsible for law enforcement, water department and the routine care of streets. In October 1993, the city did not own of possess equipment necessary to remove a large tree. It therefore contracted with United Industrial to remove a large elm tree located on city property that was dying from disease. Although city employees may pick up and remove smaller limbs, the city regularly contracts with others to remove large trees.

The parties agree that United Industrial was an independent contractor working under contract with the city to remove the large tree in question. The evidence indicates that claimant was an employee of United Industrial when he was injured. No city employees were present when the tree was being removed and the city gave no instructions to Mr. Hughes as to how or in what fashion to remove the tree. No city equipment was used, and the city did not monetarily profit from the removal of the tree.

The Appeals Board finds that under K.S.A. 44-503 the City of Clyde is the statutory employer of the claimant for purposes of this accident. K.S.A. 44-503(a) provides:

"Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if the worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed."

Claimant is a statutory employee of the City of Clyde for the reason the work which was being done was for the health, safety and welfare of the citizens of Clyde and such activities constitute an integral part of the city's "trade or business" as considered in the context of a municipality. The "trade or business" of a municipality is the operation of the city and a primary responsibility of a city is to care for the common areas. This situation is to be distinguished from that involving a private company where caring for the premises is only secondary.

In <u>Hanna v CRA, Inc.</u>, 196 Kan. 156, 409 P.2d 786 (1966), the Kansas court set out the following test to determine whether the work which gave rise to the worker's injury was a part of the principal's trade or business under K.S.A. 44-503(a); " (1) is the work being performed by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) Is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal? " If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's "trade or business," and the injured employee's sole remedy against the principal is under the workers compensation act."

See <u>Bright v Cargill, Inc.</u>, 251 Kan. 387, 837 p.2d 348 (1992) where the tests set forth in Hanna, are set forth in syllabus number 3.

The City of Clyde argues that it is immune from liability under K.S.A. 44-503 and the Kansas Tort Claims Act, K.S.A. 75-6101 through K.S.A. 75-6115. Respondent argues the state has waived the city's immunity for the wrongful acts of their employees but has not waived its immunity for situations where statutory employees are involved. The Appeals Board disagrees. K.S.A. 44-508(a)(2) defines employers as including the state or any department, agency or authority of the state, any **city**, county, school district or other political subdivision or municipality or public corporation, and any instrumentality thereof. Therefore, cities and municipalities are subject to the provisions of the Kansas Workers Compensation Act, including the provisions of K.S.A. 44-503 pertaining to statutory employers and employees. We find no indication in K.S.A. 44-508 that cities and

municipalities would be subject to the Workers Compensation Act for some purposes but not others, and respondent cites no authority for this argument.

(2) The question arose during this proceeding pertaining to what benefits were required to be paid and what payments were stayed pending this review. We direct the parties' attention to K.S.A. 44-534(a)(2). Before the Appeals Board can address this question, the issue must first be presented to the administrative law judge for determination.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that, for preliminary hearing purposes, the preliminary order of Administrative Law Judge George R. Robertson dated March 22, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.
Dated this day of July, 1994.
BOARD MEMBER
BOARD MEMBER
BOAILD MILMBLIX
BOARD MEMBER

cc:

James B. Zongker, Attorney for Claimant, PO Box 47370, Wichita, KS 67201-7370 Ronald J. Laskowski, Attorney for Respondent, PO Box 949, Topeka, KS 66601 George R. Robertson, Administrative Law Judge